CONSTITUTIONAL CHANGE WITHOUT AMENDMENT

BY JOSEPH H. CHOATE, JR.

THE defeat, at the recent New York election, of the proposed constitution prepared by the Constitutional Convention of the State, raises a serious question as to whether any comprehensive reform of the frame of government under which we live can ever be secured. Nobody doubts that the present governmental mechanism of the State of New York is, in many respects, thoroughly bad; but to carry through a popular election any new plan in which the various necessary reforms are properly correlated is an undertaking of enormous difficulty. Whatever change may be proposed inevitably creates a body of enemies. Every measure that dispenses with useless services, or wasteful expenditure, and every step in reorganization which, by concentrating responsibility, lessens the power of any office-holder, strikes a severe blow at the personal interests of the man whose services are dispensed with, or whose power is diminished. The greater the reform, the greater is the number of such individuals affected. The man whose power or pocket is hit is usually a politician, well versed in the means of influencing public opinion. He rushes to the attack with an efficiency quite beyond that which can be expected, in opposition, from defenders of the measure, who are mostly moved by public interest alone. Any new constitution, therefore, which differs in more than a few points from that which it is to replace, is instantly opposed by a formidable array of hostile groups. The better the constitution, the greater the number of bitterness of its enemies. A perfect constitution, framed by an all-wise convention, and so devised as to do away with all waste, all graft, and all corrupt politics, would create so vast and varied an army of opponents that it would find difficulty in carrying a single election district.

The enemies thus created start their attacks from a position of immense advantage. Perhaps half of our voters have—wisely enough—fallen into the habit of voting against any proposed political or legal change which they do not fully understand. This habit of voting against anything which is not understood is an almost insuperable obstacle; for how, under any conceivable circumstances, is the average voter to understand or even to imagine that he understands, so that he himself may judge it, a proposed constitution such as that which has just been rejected? Can he be expected to read all its thirty thousand words of legal phraseology? If he read it, could he form even a hazy idea of its effect on many important points? Can he, an untrained layman, be called upon to do what is difficult and toilsome even for lawyers? The answer to these questions is a painfully obvious and emphatic negative; and, because we cannot hope that the average voter ever will understand and weigh for himself such an instrument, we must face the certainty that a large and intelligent class will vote against any proposed constitution whatever, irrespective of its merits.

Moreover, the power of one who opposes a proposed measure to get people to vote against it is enormous. A politician can exert much more influence against a proposed law than against a candidate. The average voter is bound to reject almost any measure as to the merits of which he is in doubt. The most trifling uncertainty is—naturally enough—sufficient to convert him into an opponent of the proposition. Accordingly, a word of disapproval from a man whose opinion carries any weight with any voter is likely to start a spreading wave of doubt which will array masses of voters against any complicated proposed law.

What are we going to do about it? Two possible courses are obvious. We can submit a new constitution section by section, amendment by amendment, each change separately; or we can draw a radically new constitution as short and simple as the original Federal instrument, which the voters might actually read. But neither of these methods is practicable. No real reorganization can be reached by the separate submission of the large number of necessary amendments, because the defeat of one of a group of related provisions might leave the rest useless or even harmful, and also because no amendment can be so drawn as to be appropriate in connection with the rest of a constitution so

adopted, when nobody knows which of the submitted propositions are going to succeed, and which are to be rejected. You cannot draft, for example, an executive reorganization provision which will go well with a new legislative and a new judiciary article, and which will go equally well with either of the latter if one is rejected, or with neither if both meet defeat. To submit four different versions, one appropriate for each possible event, would be absurd, if not impossible. The other method is, unfortunately, a counsel of perfection. The public, or various sections of the public, want so many particular provisions that it is not possible at this day to frame a short constitution which satisfies the people's demands.

Is there, then, no remedy? I am inclined to think that there is a possible remedy, and at least an important palliative, near at hand.

No constitution—not even the vast encyclopedic documents adopted by some of the newer States—is wholly written. Many important details of the governmental system are not prescribed, but are formulated by custom. Other details, without deviation from the strict observance of the text, may be executed in several widely different ways. The language used is generally susceptible of construction; and the possible variant meanings lead to widely different results. Even after custom has apparently settled the operation of constitutional provisions, the institutions which they create may suffer startling changes without the alteration of a word in the creating provision. The most conspicuous example of this is, of course, the change in the method of electing the President of the United States. The Constitution committed the choice to the College of Electors; but the popular will demanded and obtained, without amendment, that sweeping change in our practical government by which the votes of the Electoral College came to register not the personal choice of the individual electors, but the choice of the people at large. From this instance, even when considered alone, it is plain that under favorable circumstances vast modifications may be brought about in the effect of some at least of our constitutional provisions without altering their text.

Somewhat strangely, this method of fitting our institutions to our growth seems to have been neglected. In the face of the national genius—shown in every variety of busi-

ness and sport—for analyzing to the ultimate limit the rules of the game, and devising ways to accomplish, within those rules, results unexpected and unintended by their framers, we have come to adopt toward our written constitutions a literalism which has tended to destroy both their flexibility and their elasticity. Since the early days of the nation—in fact since the change in the method of electing our presidents—we have made few efforts to see what changes could be effected within the constitutions as they stand. We have fallen into the habit of assuming that the method in which a particular provision has been practically carried out, has been the only possible method, and that while the provision stands, the resulting institution is unchangeable.

The fallacy of this assumption and the revolutionary changes which may be brought about without amendment and without violation of letter or spirit of the constitutional text—even without strained construction—can be demonstrated by at least one historical example. The Dominion of Canada is the creation of a written constitution—the British North America Act. Being an enactment, not of the people of Canada, but of the legislature of a superior and foreign sovereignty, from whose authority alone the right to change it is derived, it is apparently even more inflexible than ours. Yet without alteration it has conformed itself to the will of the people by producing a government utterly different from that apparently contemplated by the language of the instrument.

On its face, it would seem to create a government modelled rather on our National Government than on that of Great Britain. It places the executive power, not in the hands of the governing party of the Legislature, but in those of the Governor-General appointed by the Crown. Upon him it confers most of the usual prerogatives of the chief executive magistrates in our commonwealths, and many more. It gives him the veto; it authorizes him to appoint judges and other officers, and even to select the members of the Upper House of the Legislature itself. Had the instrument been acted upon in the spirit in which our constitutions are followed, the result would necessarily have been to duplicate our system of a detached, independent executive, dealing at arm's length with the legislative branch of the government. In practise, however, the result has been the exact opposite, and the Government has taken a form which prac-

tically duplicates the British Cabinet-system, of a responsible executive, consisting of a committee of the Legislature itself.

This surprising result flowed from the simplest causes. The public desire for the British form of executive was well known. To secure it all that was needed was co-operation between the nominal executive (the Governor-General) and the leaders of the majority in the Lower House. By the simple process of acting always upon the advice of the majority leaders, the Governor-General reproduces the British situation, and the executive branch of the Government, though carried on largely in his name, is actually controlled by the governing committee of the majority in the Lower House. In practise, therefore, the Dominion Cabinet, a committee of the Legislature, appoints Judges and Senators, and could, if it chose, exercise the veto power and substantially all other executive functions, while the individual members of the Cabinet are the heads of the great executive departments.

Now, if this can be done in Canada, why cannot results of equal importance be reached south of the border? Why cannot some at least of the reforms desired by many be tested by similar means? Might not important changes be tried experimentally in some such manner? And would not an experiment so tried have the very great advantage, as compared with experimental constitutional amendments, that it could easily be abandoned if it failed, instead of requiring a popular upheaval to amend it out of the constitution again? Does this not offer an immediate means of obtaining many reforms—for example, many of those included in the rejected instrument proposed for New York State?

In the way of increasing the responsibility of Government, much might be done. For example, to put an extreme case, there is nothing to prevent a strong majority party in the State of New York from establishing, under the constitution as it stands, a form of responsible Government closely analogous to the British system. All that would be necessary would be co-operation between the Governor and the leaders in the Legislature. As the first step it would be necessary for the Legislature to abandon the present pernicious committee system, which, as Lord Bryce has pointed out, is the bane of all American legislative bodies. This system, by scattering responsibility for legislation among a

score of separate committees, which act without reference to each other, and consist of men not known to the public in connection with their duties, makes the work of any legislature inharmonious and uncorrelated, and deprives the people of all real power of holding anyone accountable for bad measures. The members representing the majority party at any time could, however, by simple agreement, abolish this system, and make responsibility for all important legislation definite and certain by committing all important bills to a single leading committee, which could be given most of the important functions of the Canadian Provincial cabinets. In spite of the prohibition against the holding of executive office—presumably directed, in spirit, only against the holding of salaried office—by legislators—there would be nothing to prevent the Governor from designating each of the members of such a governing committee as his adviser with respect to the affairs of some particular executive department, and from acting on the advice of the advisers so designated. This would complete the resemblance to the cabinet system, and would furnish exactly the *rapprochement* between legislative and executive of which we feel such urgent need, giving the executive a mouthpiece in the Legislature, and the Legislature a voice in the carrying out of its enactments.

These are only fragmentary suggestions concerning a few of the profound changes in our actual Government which might be brought about without change in the text of our Constitution. The method would have at least two great advantages: methods and systems could safely be tested which no one would now dare incorporate in our Governmental machine in any such practically unchangeable manner as a constitutional amendment effects; and, on the other hand, those reforms for which constitutional amendment is clearly necessary—such as the Short Ballot—would be given a free field, and could be proposed to the electorate without being burdened by the opposition created by other measures.

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